NO. 47852-8-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALAN GERVAIS, a single man,

Plaintiff/Appellant,

vs.

BRAD L. MIEDERHOFF, a single man,
And WELLS FARGO BANK, N.A.,

Defendants/Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT LEWIS

REPLY BRIEF

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P/M: 3/28/16

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INTRODUCTION

If Brad Meiderhoff had asked his sellers, Grant Rosenlund and Carey Rosenlund, any questions about the road that is at issue in this case, or if he would have asked them to supply the explanation required by their "yes" answer to question 1(D) on the Seller's Disclosure Statement, he would have learned about the Driveway Easement that the Rosenlunds and Alan Gervais entered into in 2004. That is undisputed. Mr. Meiderhoff chose, however, to close his eyes to what was right in front of him. He now appears to claim that he didn't have to make this very simple inquiry. Rather, he seems to argue that he could proceed blindly. His failure to ask relevant questions means that he is not a purchaser in good faith and that his interest in his lot is subject to the aforementioned Driveway Easement Agreement as well as Mr. Gervais' easement implied by prior use.

ARGUMENT

I. Standard of Review.

Respondent Meiderhoff's Brief begins with a lengthy discussion of the trial court's oral decision. The use of the trial court's oral pronouncement is limited, however. As has been stated:

> . . . a trial court's oral statements are "no more than a verbal expression of (its) informal opinion at that time ... necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963) Even a trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment. *Ferree v. Doric, supra,* at 567 (383 P.2d 900); *Clifford v. State,* 20 Wn.2d 527, 148 P.2d 302 (1944); *Seidler v. Hansen,* 14 Wn.App. 915, 547 P.2d 917 (1976). The written decision of a trial court is considered the court's "ultimate understanding" of the issue presented. *Diel v. Beekman,* 7 Wn.App. 139, 499 P.2d 37 (1972).

State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980); *State v. Michielli,* 132 Wn.2d 229, 242, 937 P.2d 587 (1997) Nonetheless, the oral decision can be used to aid interpretation of the findings and to help ascertain the underlying theory of the trial court's decision if the findings that the trial court made are ambiguous. *Port Townsend Publishing Company v. Brown,* 18 Wn.App. 80, 85, 567 P.2d 664 (1977)

The case of *Lyall v. DeYoung,* 42 Wn.App. 252, 711 P.2d 356 (1985), cited by Mr. Meiderhoff, demonstrates this rule. The Court utilized the trial court's oral opinion to come to an understanding of a finding of fact that the trial court made. 42 Wn.App. at 256

Mr. Meiderhoff's Brief discussion of the trial court's oral ruling should be ignored because, as indicated above, it has no binding or final effect. That is especially true here because the trial judge stated that he

would prepare and enter written findings of fact and conclusions of law at a later time.[1] Oral Decision, pps. 3, 12-13 Its usefulness is also subject to question because it is largely a discussion of legal conclusions rather than factual findings, and legal conclusions are reviewed *de novo. Scott's Excavating Vancouver, LLC, v. Winlock Properties, LLC,* 176 Wn.App. 335, 342, 308 P.3d 791 (2013)

The trial court's oral decision is helpful only in one respect. As will be discussed below, it helps clarify its findings of fact on whether Mr. Gervais is entitled to an easement implied by prior use. Otherwise, it should not be considered.

II. The Trial Court Did Not Make Sufficient Findings of Fact on the Configuration of the Road and Its Visibility.

The trial court made no findings of fact on the configuration of the road which is the focus of this case or the fact that it is visible from Lot 3 as its goes into Lot 4. (Assignments of Error Nos. 1-2) Mr. Meiderhoff does not claim that findings of fact were made on these issues or that the facts as presented in the Brief of Appellant, pps. 11-12, are disputed. He simply states that the record contains evidence concerning the configuration of the road (Respondent Meiderhoff's Brief, p.9) He does

[1] The trial judge ultimately did not prepare the Findings of Fact and Conclusions of Law. No reason for this appears in the record.

not argue that the failure to make findings amounts to a finding against Mr. Gervais. He also does not dispute that the Court can remand for additional findings or consider these matters on this appeal since they are undisputed.

Therefore, the Court may consider the facts as presented in the Brief of Appellant concerning the road that is at issue. These include its configuration and the fact that it is visible from Lot 3 as that road goes into Lot 4. Alternatively, the Court can remand the matter for additional findings on these issues. (Brief of Appellant, p. 13)

Mr. Meiderhoff argues that the road was "overgrown." Respondent Meiderhoff's Brief, p. 17 Such a statement is not contained in the findings of fact. It is subject to dispute based on Mr. Gervais' testimony that he performed regular and continuous maintenance of the roadway. (RP 56, 61) The subjective nature of such a characterization would require remand for a specific finding of fact.

III. The Trial Court Did Not Make Sufficient Findings of Fact on Mr. Meiderhoff's Receipt of the Preliminary Commitment for Title Insurance That Referred to the Plat and His Receipt of the Plat Itself.

The preliminary commitment for title insurance that Mr. Meiderhoff received referred to the plat at issue in this case. He also

received a copy of the Plat. The trial court made no findings on these matters either. (Assignment of Error No. 3)

Mr. Meiderhoff does not appear to contest that he received the preliminary commitment for title insurance and the plat; that there were no findings of fact made to that effect; or that the failure to make the findings equates to a negative finding. Once again, the Court may consider these matters as established or remand for additional findings of fact.

IV. The Trial Court Made Insufficient Findings Concerning the Seller's Disclosure Statement.

The Rosenlunds gave an affirmative answer to Question 1(D) of the Seller's Disclosure statement to alert Mr. Meiderhoff to the existence of the Driveway Easement that allows access to Lot 4 over Lot 3. The trial court made no finding of fact on this issue. Once again, Mr. Meiderhoff does not dispute the truth of this assertion; does not argue that the trial court made no finding of fact on this matter; and does not contend that the failure to make the finding of fact requires a negative finding. The Court can therefore either consider these facts established or remand for further findings of fact on these questions.

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V. Mr. Meiderhoff Is Bound by the Terms of the Driveway Easement Because He Is Not a Purchaser in Good Faith.

The Driveway Easement was executed by Mr. Gervais and the Rosenlunds in 2004. It allowed access to Spurrel Road for both Lots 3 and 4 over the existing road. This easement was not recorded until 2010. Mr. Meiderhoff purchased Lot 3 from the Rosenlunds in 2009. He took subject to the Driveway Easement because he was on inquiry notice of its existence. In other words, he was aware of facts which should have caused an ordinarily careful person to inquire. These were the existence and configuration of the road itself; the indication on the plat that there would be joint access for Lots 3 and 4 at the southwest corner of Lot 3 and the southeast corner of Lot 4; and the affirmative answer to question 1(D) on the Seller's Disclosure Statement that Mr. Meiderhoff received from the Rosenlunds. (Brief of Appellant, pps. 19-25)

In response, Mr. Meiderhoff argues that the road appeared to be an overgrown and unused logging road. In point of fact, the road was used. It extends from Spurrel Road, the public thoroughfare, onto Lot 3 where it connects with the driveway to the house that Mr. Meiderhoff ultimately bought. It then goes into Lot 4 as anyone could see. If it was used for access to his lot, there is no reason why it couldn't also be used for access to Lot 4. There is no doubt that this configuration would cause an

ordinarily careful person to at least ask whether Lot 4 also had access to Spurrel Road over this road. The mere presence of a roadway has been held sufficient to make out inquiry notice. Brief of Appellant, p. 22

Mr. Meiderhoff dismisses the notations for joint access on the plat because there is no express easement called out on the plat. The absence of an easement doesn't end the discussion. The road is close to the southwest corner of Lot 3. And there is only one road. This clearly suggests that the road might be the joint access depicted on the plat. Since there is no easement on the plat, the existence of only one road indicates that there might be some other document establishing an easement for the benefit of both Lots 3 and 4. This state of affairs is more than sufficient to provoke an inquiry. And that is all that is required for Mr. Meiderhoff to be chargeable with notice of the Driveway Easement.

Finally, Mr. Meiderhoff relies on Finding of Fact No. 5 to argue that he was not required to ask any questions about the affirmative answer that the Rosenlunds gave to question 1(D) because it concerned access to Lot 3. In response to that question, the Rosenlunds stated that there was an agreement for access to Lot 3. Mr. Meiderhoff asserts that Finding of Fact No. 5 establishes the "legal effect" of the Seller's Disclosure Statement. (Respondent Meiderhoff's Brief, p. 10) With that statement, he indicates that Finding of Fact No. 5 is really a conclusion of law. That

means that there is no need to assign error to it and that it is reviewable *de novo* as a conclusion of law. *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P. 2d 1268 (1980); *Noble v. Lubrin*, 114 Wn.App. 812, 817-18, 60 P.3d 1224 (2003); *Scott's Excavating Vancouver, LLC. v. Winlock Properties, LLC, supra.*

The conclusion that Mr. Meiderhoff seeks to draw from Finding of Fact No. 5—for whatever value it may have as a finding of fact—cannot stand in light of Finding of Fact No. 7 which reads as follows:

> The purchase & sale documents between Gervais and Ronsenlund contemplated that access for Lot 3 would be through Lot 4—in opposite (to) what Gervais claimed in this action. Gervais may have assumed that the actual boundary between Lot 3 and Lot 4 was somewhere other than what the actual Short Plat provided.

(CP 42-43) This is supported by the guarantee of an easement in the purchase and sale documents. (Exhibits 26, 61) What Mr. Gervais and the Rosenlunds believed the configuration of the road to be is illustrated in Exhibit 28, a drawing prepared by Mr. Rosenlund. It shows the road entering Spurrel Road on Lot 4 instead of Lot 3; then extending into Lot 3 to meet with a driveway to the residence; and then going back to Lot 4. That is exactly what Mr. Rosenlund believed the situation to be. (RP 118-19;128-31) The Driveway Easement was therefore executed to secure access to Spurrel Road for Lot 3.

Mr. Gervais performed his obligation under the purchase and sale agreements by entering into the Driveway Easement with the Rosenlunds. The document was executed on October 30, 2004. (Exhibit 29) That was approximately three months after the deed to the Rosenlunds for Lot 3 was recorded. (CP 25)

Viewed in that light, the Rosenlunds affirmative answer to Question 1(D) was designed to assure Mr. Rosenlund that he did indeed have access over the road to Spurrel Road, the public thoroughfare through an existing agreement. But the Rosenlunds did not tell Mr. Meiderhoff what the terms of that access agreement might be. Would it require him to pay a fee for access? Did he have any responsibilities to maintain the road? Did the access agreement apply in the fact of any type of development of Lot 4? Did the agreement allow the road to be used by other lots in the plat, or for that matter, property outside the plat? The agreement was not disclosed on the preliminary commitment for title insurance. And the Rosenlunds didn't provide any specifics along with the Seller's Disclosure Statement. Anyone looking to buy Lot 3 and understanding that such an agreement existed would want to know what its terms might to determine whether purchasing land subject to such an agreement would be a good idea.

The trial court did not find that the Rosenlunds would not have told Mr. Meiderhoff of the existence of the Driveway Easement had he asked. It did mention this in its oral ruling. (Oral Decision, pps. 5-6) Any finding to that effect that the trial court might have made would not have been supported by substantial evidence in light of all of the facts.

In conclusion, Mr. Meiderhoff's arguments are unavailing. The configuration of the roadway along with the notations of joint access on the plat and the affirmative response to question 1(D) on the Seller's Disclosure Statement were more than sufficient to alert him to the fact that there might be some sort of arrangement for access over the road for the benefit of Lot 4. That is all that is necessary to put him on notice of the Driveway Easement. Since he is on inquiry notice, he is not a purchaser in good faith who is protected by RCW 65.08.070, the recording statute. Therefore, his interest in Lot 3 is subject to the Driveway Easement.

VI. There Is An Easement Implied from Prior Use over Lot 3.

Mr. Gervais maintained an easement implied from prior use for the benefit of Lot 4 over Lot 3. The trial court erred in concluding otherwise because it did not apply the proper test to determine whether such an easement exists. (Brief of Appellant, pps. 25-34) Mr. Meiderhoff's arguments on this issue must be rejected.

The trial court's oral decision clarifies its thinking and the findings of fact that it made. In Finding of Fact No. 10, the Court stated:

> Gervais' access through Lot 3 to do occasional maintenance on Lot 4 up to 2010 did not create an apparent, hostile or continuous use of the driveway on Lot 3.

(CP 43) Then, in Conclusion of Law No. 3, it said:

> Gervais' use of the driveway on Lot 3 to access Lot 4 was no apparent, hostile or continuous for a period of 10 years to create a prescriptive easement.

(CP 44) The juxtaposition of Finding of Fact No. 10 and Conclusion of Law No. 3 and the language used in each of them show that the finding of fact related only to Mr. Gervais' claim for a prescriptive easement, a claim that the trial court rejected and that Mr. Gervais has not raised on appeal. In its oral opinion, the trial court indicated that its finding did not apply to Mr. Gervais' claim for an easement implied from prior use. As it stated on page 10 of the Oral Decision:

> Second, the Court considers an apparent or continuous quasi-easement. And, in that case, actual continuous use is not as necessary—it's not absolutely necessary. Here the fact that there is some existence of a roadway and some evidence of past use has some bearing, even though it wouldn't be enough to show a prescriptive easement.

It then based its decision to deny the easement on the basis that the easement was not sufficiently necessary. (Oral Decision, p. 11) It set out this ruling in Conclusion of Law No. 5. (CP 44)

Mr. Meiderhoff suggests that the standard for the reservation of an easement implied through necessity is greater than one implied by grant, citing *Wreggit v. Porterfield,* 36 Wn.2d 638, 219 P.2d 589 (1950). The Court clarified the test in *Adams v. Cullen,* 44 Wn.2d 502, 268 P.2d 451 (1954), discussed in Brief of Appellant, pps. 30-32. The opinion in that case made clear that the issue is existence or non-existence of a prior use as weighed against the necessity of that use. The only reference to whether a different test would be applied for an easement implied by reservation is its statement that "as necessity decreases, a point is reached where necessity without reference to any prior use may justify the implication of an easement in favor of the conveyee though a like necessity would not justify an implication in favor the conveyor." It then went on to state that an increasing degree of necessity will require clarity of the implication from the prior use. 44 Wn.2d at 408-409 In other words, whether the easement is implied by reservation or by grant is not the focus. The key issue is whether the expense of an alternative is disproportionate weighed against the use that is made.

Mr. Meiderhoff then goes on to state that the expense of producing another road, approximately $30,000 to $31,000, was found by the trial

court not to be unreasonable. Respondent Meiderhoff's Brief, p. 22.[2] That is not, however, what the trial court found. In Finding of Fact No. 11, the trial court stated:

> Gervais established that a method of switch-backing for installation of a driveway on Lot 4 from Spurrel Road may be more expensive but could be achieved.

(CP 43, FF 11) That is not helpful and won't support the trial court's conclusions of law on this issue. "Reasonable necessity," one that renders the easement to be essential to the convenient or comfortable enjoyment of the property as it existed when the severance took place, is all that is required. (Brief of Appellant, p. 29) Whether building another road could be done simply doesn't answer the question of whether the use is "reasonably necessary" as defined in case law. In this way, the trial court applied the wrong test in determining whether an easement implied by prior use exists.

The trial court believed that all elements for implying an easement from prior use were present except for reasonable necessity. Its oral decision shows this to be the case. It incorrectly applied the test for reasonable necessity in coming to its conclusion. This was error.

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[2] Mr. Meiderhoff claims that the amount necessary for the new road is $18,500.00. (Respondent Meiderhoff's Brief, p. 22 That was not the testimony. John Van Vessem, Mr. Gervais' witness on this point, set out several types of expenses including building the road, engineering, and permits totaling between $30,000.00 and $31,000. (RP 164-68; Brief of Appellant, pps. 8-9)

VII. Mr. Meiderhoff Was on Inquiry Notice of the Easement Implied from Prior Use.

A purchaser of land is on inquiry notice of—and therefore takes subject to—an easement implied from prior use. Brief of Appellant, pps. 24-25. Mr. Meiderhoff does not contest this assertion. It should be accepted by the Court.

VIII. Mr. Gervais' Motion for Reconsideration Was Timely.

Mr. Meiderhoff claims that the Motion for Reconsideration made by Mr. Gervais was not timely because it was filed more than ten days after the Court made its oral decision. This contention is wrong.

The trial court gave its oral decision on April 10, 2015. Mr. Gervais moved for reconsideration on June 26, 2015. (CP 33) The trial court entered its Findings of Fact and Conclusions of Law and the Judgment in this matter on June 29, 2015. (CP 41-46) A motion for reconsideration must be filed within ten days of the entry of a judgment, decision, or other order. CR 59(b) Since the motion for reconsideration was filed before the entry of the Findings of Fact and Conclusions of Law and the Judgment, it was timely. The trial court noted as much. (CP 47)

A reconsideration motion directed to an ultimate determination is timely if it is made within ten days of the date of the judgment regardless of when the trial court gives its oral opinion or even regardless of when it

makes a letter ruling. *Marriage of Tahat,* 182 Wn.App. 655, 334 P.3d 1131 (2014) In that case, the Court ruled that a letter ruling by the trial judge did not amount to an "order" or "decision" that triggered the running of the ten day limit on filing motions of reconsideration. It based its decision in part on the notion that "orders" and "decisions" for the purposes of CR 59(b) are final rulings similar to judgments. It noted preliminary decisions, both oral and written, have no final and binding effect and can always be changed. 182 Wn.App. 672 It pointed to the fact that the letter ruling clearly envisioned further orders. 182 Wn.App. at 673

Our case is stronger than *Marriage of Tahat, supra,* for the proposition that a preliminary ruling does not trigger the time to file a motion for reconsideration. The trial court's decision was oral, not written as in *Marriage of Tahat, supra,* and therefore not final or binding as discussed above. Furthermore, the trial court indicated that it would prepare its own findings of fact and conclusions of law. This, of course, would allow it to revise and clarify what it stated orally.

Since the motion for reconsideration was made prior to the entry of the Findings of Fact and Conclusions of Law and the Judgment, it was made within ten days of entry of judgment and was therefore timely.

IX. Mr. Meiderhoff Is Not Entitled to An Award of Attorney's Fees.

Mr. Meiderhoff has requested an award of attorney's fees. He is not entitled to attorney's fees for two reasons. First and foremost, he will not prevail in this appeal. Secondly, he has not supported his request with any authority showing that he should receive such an award.

A party seeking attorney's fees on appeal must devote a section of the brief to the request. RAP 18.1(b) That argument must be more than a bald reference to RAP 18.1. Argument and citation to authority are required under the rule or the request will be denied. *Wilson Court Limited Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 fn. 4, 952 P.2d 590 (1998); *Austin v. US Bank of Washington,* 73 Wash.App. 293, 313, 869 P.2d 404 (1994); *Phillips Building Company, Inc. v. An*, 81 Wn.App. 696, 704-705, 915 P.2d 1146 (1996)

Mr. Meiderhoff has devoted a section of his brief to this question but has not provided any authority to support the request. Attorney's fees can only be awarded if there is a contract, statute, or recognized ground in equity for such an award. *Filipino American League v. Carino,* 183 Wn.App. 122, 129, 332 P.3d 1150 (2014) Mr. Meiderhoff has cited only to RAP 18.12. That rule governs accelerated review. It does not mention

or support entitlement to attorney's fees on appeal. No other grounds are stated. Furthermore, counsel knows of no authority for an award of attorney's fees for Mr. Meiderhoff should he prevail. Therefore, the request for attorney's fees should be denied.

CONCLUSION

The trial court erred in ruling that no easement implied by prior use existed; that Mr. Meiderhoff was not on inquiry notice of the Drvieway Easement; and that Mr. Meiderhoff was not on inquiry notice of the easement implied by prior use. Mr. Meiderhoff's arguments do not refute that conclusion. The Court should reverse the trial court's decision. It should also rule that an easement implied by prior use for ingress and egress exists over Lot 3 for the benefit of Lot 4 and that such an easement and the Driveway Easement are superior to Mr. Meiderhoff's interest in Lot 3. Alternatively, the Court should remand for additional findings of fact. In any event, Mr. Meiderhoff is not entitled to an award of attorney's fees.

DATED this 21 day of March, 2016.

BEN SHAFTON WSB#6280
Of Attorneys for Plaintiff/Appellant

NO. 47852-8-II
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ALAN GERVAIS, a single man,

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vs.

BRAD L. MIEDERHOFF, a single man,
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APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT LEWIS

DECLARATION OF MAILING

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COMES NOW Amy Arnold and declares as follows:

1. My name is Amy Arnold. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On March 28, 2016, I caused to be deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Brief of Appellant to the following person(s):

Cassie N. Crawford
Attorney at Law
P.O Box 61488
Vancouver, WA 98666

Valerie Holder
Attorney at Law
1301 Fifth Ave.
Suite 3100
Seattle, WA 98101

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 28th day of March, 2016.

AMY ARNOLD

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March 28, 2016

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Re: *Gervais v. Meiderhoff,* No. 47852-8-II

Dear Mr. Ponzoha:

Please find enclosed for filing the original and one copy of both the Reply Brief and the Declaration of Mailing.

Thank you for your attention to this matter.

Very truly yours,

Ben Shafton
Enclosures

BTA

Cc: Alan Gervais
Cassie Crawford
Valerie Holder